

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

WES JOHNSON,

Plaintiff,

vs.

WELLS FARGO HOME MORTGAGE,  
INC., a California Corporation, dba  
AMERICA'S SERVICING COMPANY,  
et. al.,

Defendants.

3:05-CV-0321-RAM

**MEMORANDUM DECISION  
AND ORDER**

Before the court is Defendant Wells Fargo Bank, N.A.'s Motion for Summary Judgment (Doc. #105). Plaintiff responded to the motion (Doc. #112) and Defendant replied (Doc. #119).

**I. BACKGROUND**

**A. Factual Background**

Defendant Wells Fargo Home Mortgage, Inc. dba America's Servicing Company (ASC) purchased and serviced ten (10) of Plaintiff Wes Johnson's real property mortgage loans. This action arises out of two (2) of those loans, Loans 55 and 56 (Doc. #112 at 2). Plaintiff alleges Defendant erroneously reported Loans 55 and 56 delinquent to the three (3) major credit reporting agencies (CRAs) (*Id.*). Plaintiff further alleges Defendant foreclosed on Loan 56 and continued to erroneously report both loans delinquent despite Plaintiff's numerous attempts to correct the erroneous information (*Id.*). Plaintiff asserts he suffered millions of

1 dollars in actual damages due to Defendant's erroneous reporting, which Plaintiff contends  
2 was a willful violation of the Fair Credit Reporting Act (FCRA).

3 Construing the facts in the light most favorable to Plaintiff, it appears Plaintiff notified  
4 the CRAs that he disputed Defendant's reporting of the two (2) loans. Plaintiff also spent  
5 approximately nine (9) months making multiple phone calls and sending correspondence,  
6 cancelled checks and loan documents to Defendant in an unsuccessful attempt to verify that  
7 both loans were current (Doc. #112 at 2). Apparently, Plaintiff wrote a check to make a  
8 payment on Loan 56; but, Defendant misapplied the check to Loan 55 causing Loan 56 to  
9 become delinquent (*Id.*). Although Defendant acknowledged the check was, in fact,  
10 misapplied to the wrong account, rather than correct the error, Defendant informed Plaintiff  
11 it would not reverse the check and apply it to Loan 56 because it mistakenly believed Loan  
12 55 was also delinquent (*Id.*). Eventually, Defendant foreclosed on Loan 56 and continued to  
13 erroneously report both Loans 55 and 56 delinquent to the CRAs (*Id.*).

14 Plaintiff alleges Defendant's willful conduct of refusing to correct its error and  
15 continuously reporting both Loans 55 and 56 delinquent to the CRAs caused him to suffer  
16 well over thirty (30) million dollars in actual damages (Doc. #105 at 5-6). Plaintiff claims  
17 he suffered damages by being precluded from acquiring mortgage loans and refinancing  
18 existing loans and being forced to pay higher interest rates on various mortgages and lines  
19 of credit (Doc. #112 at 2). Plaintiff also claims he suffered damages when his existing lines  
20 of credit and credit cards were reduced and/or cancelled (*Id.*). To name just a few, Plaintiff  
21 alleges he suffered the following actual damages: more than six (6) million dollars in lost  
22 business opportunities by being unable to develop certain properties; more than eleven (11)  
23 million dollars in anticipated profits by being forced to sell properties early; more than nine  
24 (9) millions dollars in lost business opportunities on approximately fifty (50) real estate  
25 transactions he was unable to purchase; and approximately \$25,000 in lost profits by being  
26 forced to sell stock prematurely (*Id.*). Plaintiff also seeks punitive damages asserting  
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1 Defendant's refusal to reinvestigate Plaintiff's dispute and failure correct its error was a  
2 willful violation of the FCRA (Doc. #112 at 7).

3 **B. Procedural Background**

4 On June 20, 2007, Plaintiff filed an Amended Verified Complaint, which included the  
5 following causes of action: 1) violations of the Real Estate Settlement Procedures Act (12  
6 U.S.C. § 2605) (RESPA); 2) violations of the Fair Credit Reporting Act (15 U.S.C. § 1681s-2)  
7 (FCRA); 3) violations of the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et. seq.)  
8 (FDCPA); and, 4) negligence (Doc. #66). On August 16, 2007, Defendant filed a motion for  
9 summary judgment on each of Plaintiff's causes of action (Doc. #70). On October 29, 2007,  
10 the court granted Defendant's motion for summary judgment on Plaintiff's First, Third and  
11 Fourth causes of action and denied Defendant's motion as to Plaintiff's Second cause of action  
12 for violations of the FCRA (*Id.*). The court determined there were genuine issues of material  
13 fact precluding summary judgment with regards to some of Plaintiff's alleged damages under  
14 the FCRA (Doc. #94). Specifically, the court found there were genuine issues of material fact  
15 as to 1) whether Defendant was properly notified of the disputed information and 2) whether  
16 the credit reports obtained in the various transactions giving rise to Plaintiff's alleged  
17 damages were obtained for "consumer purposes" and not for "business purposes" such that  
18 the various transactions would be subject to the requirements and protections of the FCRA  
19 (*Id.*). Based on the court's ruling, Defendant filed the instant motion for summary judgment  
20 asserting Plaintiff's alleged damages are not recoverable under the FCRA (Doc. #105).

21 **II. STANDARD FOR SUMMARY JUDGMENT**

22 The purpose of summary judgment is to avoid unnecessary trials when there is no  
23 dispute as to the facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*,  
24 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to summary judgment where,  
25 viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there  
26 are no genuine issues of material fact in dispute and the moving party is entitled to judgment  
27 as a matter of law. FED. R. CIV. P. 56(c); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

1 Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary  
2 basis for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where  
3 reasonable minds could differ on the material facts at issue, however, summary judgment is  
4 not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*,  
5 516 U.S. 1171 (1996).

6 The moving party bears the burden of informing the court of the basis for its motion,  
7 together with evidence demonstrating the absence of any genuine issue of material fact.  
8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,  
9 the party opposing the motion may not rest upon mere allegations or denials of the pleadings,  
10 but must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty*  
11 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an  
12 inadmissible form, only evidence which might be admissible at trial may be considered by a  
13 trial court in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); *Beyene v.*  
14 *Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

15 In evaluating the appropriateness of summary judgment, three steps are necessary:  
16 (1) determining whether a fact is material; (2) determining whether there is a genuine issue  
17 for the trier of fact, as determined by the documents submitted to the court; and (3)  
18 considering that evidence in light of the appropriate standard of proof. *Anderson*, 477 U.S.  
19 at 248. As to materiality, only disputes over facts that might affect the outcome of the suit  
20 under the governing law will properly preclude the entry of summary judgment; factual  
21 disputes which are irrelevant or unnecessary will not be considered. *Id.* Where there is a  
22 complete failure of proof concerning an essential element of the nonmoving party's case, all  
23 other facts are rendered immaterial, and the moving party is entitled to judgment as a matter  
24 of law. *Celotex*, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut,  
25 but an integral part of the federal rules as a whole. *Id.*

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### III. DISCUSSION

Defendant moves for summary judgment on Plaintiff's FCRA claim asserting Plaintiff's alleged damages resulted from the use of credit reports, if any, in connection with his business or commercial transactions, which are not consumer reports subject to the FCRA (Doc. #105 at 18). Defendant further asserts that it cannot be held liable for Plaintiff's business losses predating Defendant's alleged failure to reinvestigate; Plaintiff's damage theory based on anticipated profits is barred as a matter of law; Plaintiff cannot claim damages for lost real estate opportunities under the FCRA; and Plaintiff is not entitled to punitive damages because he failed to sufficiently plead a willful failure to investigate on the part of Defendant (*Id.* at 24-30).

Plaintiff argues his damages arise from the inaccurate information reported by Defendant and not from the use of any credit reports (Doc. #112 at 3-5). Plaintiff further argues that Defendant is liable for any actual damages arising from its failure to comply with the FCRA; his anticipated profits are not barred as a matter of law; the FCRA does not bar recovery of damages for lost real estate opportunities; and he is entitled to punitive damages because Defendant's violation was willful (*Id.* at 5-7).

In its October 29, 2007 Order, the court found Plaintiff's commercial loans and business lines of credit did not fall under the coverage of the FCRA (Doc. #94). The court made this determination due to Plaintiff's failure to dispute the alleged transactions were purely commercial and/or business in nature and Plaintiff's failure to show that, despite the transactions being commercial and/or business in nature, a consumer report was involved in the transactions, thereby, bringing them within the scope of the FCRA. The court specifically stated "[u]nder these facts, the credit reports obtained for Plaintiff's commercial loans do not fall under the FCRA [as Plaintiff did not allege a consumer report was involved in any of the transactions]; however, the credit reports obtained in connection with Plaintiff's credit lines (provided they are personal lines of credit and not business lines of credit) and personal financing are 'consumer reports' falling within the coverage of the FCRA." (*Id.* at 12-

13 (emphasis added)). The court also found material questions of fact existed as to whether any of Plaintiff's other alleged damages involved the use of a consumer report bringing those transactions under the coverage of the FCRA (Doc. #94 at 13).

Based on the court's finding that Plaintiff's business and commercial transactions are not subject to the FCRA, Defendant brought the instant motion asserting any reports used in connection with Plaintiff's alleged damages were not "consumer reports" because they were all in connection with business or commercial transactions. Plaintiff does not dispute Defendant's assertion that no consumer reports were involved in the various transactions; but, rather he argues that his business damages are, nevertheless, recoverable under the FCRA simply because Defendant failed to comply with the requirements set forth under the FCRA (Doc. #112 at 3).

Plaintiff appears not only to misconstrue the court's previous order expressly finding his business and commercial transactions are not subject to the FCRA, but also to misunderstand the causal connection required to link his alleged actual damages to Defendant's violation. Thus, due to the apparent misconception and the developing caselaw in this area, the court will address each damage claim in Defendant's motion, including Plaintiff's business and commercial transactions, to determine if a consumer report was obtained bringing the transaction under the coverage of the FCRA. The court will then address Defendant's remaining arguments.

#### **BRIEF OVERVIEW OF THE FCRA AND FURNISHER'S OF INFORMATION**

The Fair Credit Reporting Act (FCRA) was enacted in 1970, prefaced with a congressional finding that "unfair credit methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1); *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1058-1059 (9th Cir. 2002). The FCRA provides for civil and criminal penalties for those who do not comply with its requirements. 15 U.S.C. § 1681n; 15 U.S.C. § 1681o; *see also, Comeaux v. Brown v. Williamson Tobacco Co.*,

915 F.2d 1264, 1272 (9th Cir. 1990). Sections 1681n<sup>1</sup> and 1681o<sup>2</sup>, respectively, make CRAs and users of information liable for willful or negligent noncompliance with “any requirement imposed” under the FCRA. *Comeaux*, 915 F.2d at 1272. While §§ 1681n and 1681o undoubtedly create private rights of action for consumers, § 1681s-2(b), dealing with furnishers of information, does not expressly create a private right of action. The Ninth Circuit, however, holds an individual consumer does have a private right of action against a furnisher of information under § 1681s-2(b). *Nelson*, 282 F.3d at 1057.

A furnisher of information can be held liable for failing to comply with the requirements set forth in Section 1681s-2(b), which include the following upon proper notice of a dispute: 1) conduct an investigation with respect to the disputed information; 2) review all relevant information provided by the CRA pursuant to § 1681i(a)(2); 3) report the results of the investigation to the CRA; and 4) if the investigation finds the information is incomplete or inaccurate, report those results to all CRAs to which the person (furnisher) furnished the information and that compile and maintain files on consumers on a nationwide basis. *Nelson*, 282 F.3d at 1059.

Liability on a furnisher is limited in that an individual consumer cannot state an FCRA claim against a furnisher unless the furnisher receives notice of the disputed information *from the CRA* and fails to comply with its duties. *Id.* at 1060 (“Congress did provide a filtering mechanism in § 1681s-2(b) by making the disputatious consumer notify a CRA and setting up the CRA to receive notice of the investigation by the furnisher.”); *see also Marshall v. Gravitt*, 2007 WL 1792416, 3, ---- F. Supp. 2d ---- (D. Nev. 2007) (official citation not

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<sup>1</sup> Section 1681n provides: “Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 or more than \$1000 ... [and] such punitive damages as the court may allow; and ... costs of the action together with reasonable attorney’s fees ...”

<sup>2</sup> Section 1681o provides: “Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of any actual damages sustained by the consumer as a result of the failure; and ... costs of the action together with reasonable attorney’s fees ...”



available); *Abouelhassan v. Chase Bank*, 2007 WL 3010421, ---- F. Supp. 2d ---- (N.D. Cal. 2007) (official citation not available); *Nelson v. Equifax Information Services, LLC*, 522 F. Supp. 2d 1222, 1231 (C.D. Cal. 2007) (interpreting *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d at 1060 as “specifically [holding] that the furnisher’s Section 1681s-2(b) duty to investigate is triggered only after the consumer notifies the CRA, and the CRA then notifies the furnisher of credit.”). Thus, a furnisher’s duty to investigate does not arise unless it receives notice of the dispute from the CRAs directly. The Ninth Circuit interpreted this “filtering mechanism” as an “opportunity for the furnisher to save itself from liability by taking the steps required in § 1681s-2(b).” *Nelson*, 282 F.3d at 1060. Failure to take the required steps can result in liability.

**LIABILITY OF FURNISHERS OF INFORMATION UNDER §1681S-2(B) AND PROVING DAMAGES**

Plaintiff alleges Defendant willfully and/or negligently violated §1681s-2(b) of the FCRA by failing to conduct a reasonable investigation of the debts Defendant reported to the CRAs after being notified by the CRAs and by Plaintiff that the debts were in dispute (Doc. #66, Doc. #112 at 4). Based on Defendant’s alleged willful violation, Plaintiff claims he is entitled to his actual damages, punitive damages and reasonable costs and attorney’s fees (Doc. #66). However, in order to prove actual damages, Plaintiff must do more than show a failure to comply with the FCRA; Plaintiff must also show he suffered the alleged actual damages *because of* Defendant’s violation. To clarify, the court will demonstrate the required elements Plaintiff must show in order to prove his alleged damages.

**A. Failure to comply with the FCRA**

The first element in stating an FCRA claim against Defendant requires Plaintiff to show that Defendant failed to comply with the FCRA. As previously stated, Defendant can be held liable for failing to conduct an investigation with respect to the disputed information; failing to review all the relevant information provided by the CRA pursuant to §1681i(a)(2); failing to report the results of the investigation to the CRA; and, if Defendant’s investigation



found the information incomplete or inaccurate, failing to report those results to all the CRAs to which Defendant furnished the disputed information and those that compile and maintain files on consumers on a nationwide basis. *Nelson*, 282 F.3d at 1059.

As previously discussed, there are genuine issues of material fact as to whether and when a CRA notified Defendant of the disputed information. This is important because Defendant's duties under the FCRA are not triggered until it is notified by a CRA directly. *Nelson*, 282 F.3d at 1060. Defendant disputes being properly notified; however, there is no dispute that Plaintiff completed a Credit Report Dispute Form on December 14, 2004 indicating he disputed Defendant's reporting (Doc. #105 at 26). Defendant has not argued for summary judgment on the basis that it did, in fact, take reasonable steps to investigate or reinvestigate the disputed information; rather, Defendant moves for summary judgment solely on the basis that Plaintiff's alleged damages are not recoverable under the FCRA and Plaintiff has failed to sufficiently plead a willful violation.

Viewing the facts and the evidence in the light most favorable to Plaintiff, he has shown Defendant failed to comply with the requirements set forth in the FCRA; thus, he has met the first element.

#### **B. Actual Damages and the Use of a Consumer Report**

The next element in stating an FCRA claim against Defendant requires Plaintiff to show that he is entitled to damages under the FCRA. The FCRA provides for three types of damages depending upon whether the violation was willful or negligent – actual, statutory and punitive. If Plaintiff proves a willful violation, he will be entitled to either actual damages or statutory damages and he may be entitled to punitive damages at the court's discretion. 15 U.S.C. § 1681n.<sup>3</sup> If Plaintiff proves a negligent violation, he will only be entitled to actual

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<sup>3</sup> 15 U.S.C. § 1681n provides, in pertinent part:

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of--  
(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000; ...

....

1 damages. 15 U.S.C. § 1681o.<sup>4</sup> Because Plaintiff alleges both a willful and a negligent violation  
 2 of the FCRA, his next step is to show he suffered actual damages because of Defendant's  
 3 violation.

4 Defendant asserts Plaintiff cannot establish actual damages under the FCRA because  
 5 the alleged damages at issue are for business and/or commercial transactions not subject to  
 6 the FCRA and Plaintiff is not entitled to anticipated profits or lost real estate opportunities  
 7 (Doc. #105). To support its assertion, Defendant contends that no consumer reports were  
 8 involved in any of the various transactions giving rise to Plaintiff's alleged actual damages  
 9 (*Id.*).

10 Plaintiff argues §§ 1681n and 1681o provide for any actual damages sustained by a  
 11 consumer as a result of the willful or negligent failure to comply with the FCRA (Doc. #112  
 12 at 5). Plaintiff further argues that Defendant mistakenly framed the issue making "much ado  
 13 about nothing in regards to the FCRA's definition of a 'consumer report'..." because he is not  
 14 basing his damages on the use of a credit report (*Id.* at 3-4). Plaintiff does briefly state that  
 15 § 1681(a)(3)(F) identifies a business transaction initiated by a consumer as a permissible  
 16 purpose under the definition of a consumer report; however, Plaintiff does not dispute the  
 17 transactions at issue were solely business and/or commercial in nature.

18 Plaintiff's argument that the use of a consumer report and the definition of a consumer  
 19 report are irrelevant to his claim for actual damages fails as a matter of law. Plaintiff claims  
 20 damages resulting from various business and/or commercial transactions, including denials  
 21

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22 (2) such amount of punitive damages as the court may allow; and  
 23 (3) in the case of any successful action to enforce any liability under this section, the costs of the  
 action together with reasonable attorney's fees as determined by the court.

24 <sup>4</sup>15 U.S.C. § 1681o provides, in pertinent part:

25 Any person who is negligent in failing to comply with any requirement imposed under this  
 26 subchapter with respect to any consumer is liable to that consumer in an amount equal to the  
 sum of --

27 (1) any actual damages sustained by the consumer as a result of the failure; and  
 28 (2) in the case of any successful action to enforce liability under this section, the costs of the  
 action together with reasonable attorney's fees as determined by the court.

1 of credit and increased interest rates and fees. As set forth in detail *infra*, it is generally held  
2 that losses resulting from the use of a credit report solely for a business or commercial  
3 transaction are not recoverable under the FCRA. Yet, in an attempt to seek recovery for his  
4 commercial and businesses losses, despite the fact they are losses resulting from the use of  
5 a credit report solely for a business or commercial transaction, Plaintiff contends he is not  
6 basing his losses on the use of a credit report. Plaintiff's argument fails because, without the  
7 credit report, there is no causal connection between his alleged damages and Defendant's  
8 violation of the FCRA. And, in order for the credit report to be subject to the requirements  
9 of the FCRA, it must be a consumer report. Thus, the use of a consumer report and the  
10 definition of a consumer report are vital to Plaintiff's FCRA claim.

11 The FCRA does not presume actual damages for a negligent or willful failure to comply  
12 with any of its requirements. Plaintiff bears the burden of proving that his damages were, in  
13 fact, caused by Defendant's violation. While the FCRA expressly provides for "actual  
14 damages" for a negligent or willful violation, §§ 1681n and 1681o also expressly provide that  
15 a violator is liable "to that consumer." Thus, logically, Plaintiff must be acting in a consumer-  
16 capacity and must causally link his alleged damages to his status as a consumer. In other  
17 words, Plaintiff must show Defendant's violation resulted in damages to Plaintiff as a  
18 consumer.

19 The term "consumer" is defined as an individual. 15 U.S.C. § 1681a(c). Therefore, it  
20 follows that the FCRA is designed to protect consumers in their individual capacities. In  
21 order to prove actual damages under the FCRA, Plaintiff must show Defendant's violation  
22 caused Plaintiff, as an individual consumer, the alleged damages he claims in each of the  
23 transactions at issue. Under the facts of this case, a consumer report is necessary to make  
24 that causal connection. As stated by House representative Sullivan, the FCRA's sponsor, on  
25 the house floor: "The purpose of the Fair Credit Reporting Bill is to protect consumers from  
26 inaccurate or arbitrary information *in a consumer report* which is used as a factor in  
27 determining an individual's eligibility for credit, insurance or employment. It does not apply  
28

1 to reports used for business, commercial or professional purposes.” 116 Cong. Record 36,572  
 2 (1970) (emphasis added).

3 To further illustrate why a consumer report is vital to Plaintiff’s claim, the court turns  
 4 to Plaintiff’s alleged damages resulting from a third-party’s decision to deny Plaintiff credit,  
 5 increase his interest rates and cancel or reduce his existing lines of credit due to Defendant’s  
 6 erroneous reporting. In order to be recoverable as actual damages under the FCRA, those  
 7 decisions must have been made based on the erroneous information reported by Defendant.  
 8 In order to show the decisions were made based on that erroneous information, the decision-  
 9 makers must necessarily have had knowledge of the erroneous information. In order to  
 10 acquire such knowledge, the decision-makers must have obtained a credit report containing  
 11 the erroneous information. And, in order to be subject to the FCRA, the credit report  
 12 obtained must have been a consumer report as defined under the FCRA. Thus, a consumer  
 13 report is vital to Plaintiff’s claim. Without the consumer report, a plaintiff would essentially  
 14 be able to claim every undesirable financial event he encountered since the defendant’s  
 15 violation without actually proving the event occurred because of defendant’s violation, rather  
 16 than due to some other reason. Accordingly, the definition of a consumer report is crucial  
 17 because it controls the FCRA’s applicability.

18 The FCRA defines a “consumer report” as follows:

19 [A]ny written, oral, or other communication of any information by a consumer  
 20 reporting agency bearing on a consumer’s credit worthiness, credit standing,  
 21 credit capacity, character, general reputation, personal characteristics, or mode  
 of living which is used or expected to be used or collected in whole or in part for  
 the purpose of serving as a factor in establishing the consumer’s eligibility for--

22 (A) credit or insurance to be used primarily for personal, family, or household  
 purposes;

23 (B) employment purposes; or

24 (C) any other purpose authorized under section 1681b of this title.

25 15 U.S.C. § 1681a(d)(1).

26 Some cases have either expressly or implicitly limited consideration of whether a  
 27 particular report is a consumer report to examining the purpose for which a particular report  
 28 is requested by the report’s user. *See, e.g., Hovater v. Equifax, Inc.*, 823 F.2d 413 (11th Cir.

1 1987); *Matthews v. Worthen Bank & Trust Co.*, 741 F.2d 217 (8th Cir. 1984); *Henry v.*  
2 *Forbes*, 433 F. Supp. 5 (D. Minn. 1976); *Sizemore v. Bambi Leasing Corp.*, 360 F. Supp. 252  
3 (N.D. Ga.1973). Other courts, however, including the Ninth Circuit, have applied the FCRA  
4 more broadly, focusing not only on the purpose for which the credit report was sought, but  
5 also the purpose for which the information was obtained. *Hanson v. Morgan*, 582 F.2d 1214,  
6 1218 (9th Cir. 1978); *see also, Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 (7th Cir. 1988);  
7 *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980). Thus, in the  
8 Ninth Circuit, the court must look both at the purpose for a third-party obtaining a credit  
9 report and the purpose for which the information was obtained by the CRA. *Comeaux*, 915  
10 F.2d at 1274; *Hansen*, 582 F.2d at 1218; *Heath*, 618 F.2d 693.

11 The law of this circuit, as well as that of almost all other circuits that have  
12 addressed the question, supports the following proposition: *If a consumer*  
13 *reporting agency provides a report based on a reasonable expectation that*  
14 *the report will be put to a use permissible under the FCRA, then that report*  
*is a 'consumer report' under the FCRA and the ultimate use to which the*  
*report is actually put is irrelevant to the question of whether the FCRA*  
*governs the report's use and the user's conduct.*

15 *Comeaux*, 915 F.2d at 1274 (emphasis in original).

16 As previously stated, Plaintiff does not dispute that the transactions at issue were  
17 business and commercial transactions, nor does he argue that the CRAs believed they were  
18 collecting the information for other than business or commercial purposes. Instead, Plaintiff  
19 merely states that “Section 1681b(a)(3)(F) identifies a business transaction that is initiated  
20 by the consumer as a permissible purpose.” (Doc. #112 at 4). Plaintiff does not cite to any  
21 authority interpreting this language, nor does he provide his own explanation for such a  
22 broad and expansive interpretation. To the contrary, Plaintiff simply concludes that it is  
23 irrelevant whether a consumer report was involved in any of these transactions and, in any  
24 event, a consumer report was, nevertheless, involved because they were all business  
25 transactions initiated by him (*Id.*). Plaintiff’s argument lacks merit and is contrary to Ninth  
26 Circuit case law.

1           One of the purposes authorized under § 1681b includes furnishing a consumer report  
2 to a person which the CRA has reason to believe has a legitimate business need for the  
3 information in connection with a business transaction that is initiated by the consumer. 15  
4 U.S.C. § 1681b(a)(3)(F). Plaintiff appears to interpret the language “business transaction that  
5 is initiated by the consumer” to cover all business and commercial transactions initiated by  
6 him regardless of whether those transactions are consumer transactions. This court declines  
7 to read § 1681b(a)(3)(F) so broadly as to essentially expand the scope and coverage of the  
8 FCRA to include all business and commercial transactions. To do so would require ignoring  
9 an essential element included in § 1681b – *a consumer report*. Thus, the court finds  
10 Plaintiff’s argument fails as a matter of law for the reasons set forth below.

11           First, § 1681b pertains to permissible purposes under which a CRA can furnish a  
12 consumer report. The language of § 1681b does not expand the definition of a consumer  
13 report; it instructs the CRAs on when it is permissible to furnish a consumer report. Thus,  
14 a “consumer report” as defined under § 1681a(d)(1) is presupposed under this section.

15           Second, the language of § 1681b(a)(3)(F) clearly states the “business transaction” at  
16 issue is initiated by “the consumer.” Once again, this language unequivocally makes clear  
17 that the person who is the subject of the requested report is a consumer, not a business entity  
18 or a person acting outside of his consumer-capacity. Thus, a consumer is also presupposed  
19 under this section.

20           Third, § 1681b(a)(3)(F) does not state that all business and commercial transactions  
21 initiated by an *individual* fall under this section. While the definition of “consumer” is an  
22 individual, the terms are not necessarily interchangeable. In other words, a consumer must  
23 be an individual and cannot be a business or a group of people; however, it does not follow  
24 that every transaction initiated by an individual is a consumer transaction or that an  
25 individual is always acting in a consumer-capacity. For example, a consumer who applies for  
26 a home mortgage would certainly fall under the protections of the FCRA. Prior to lending the  
27 consumer money for the home mortgage, a lender would obtain a consumer report on the  
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1 consumer to obtain information regarding the consumer's credit worthiness. While a home  
2 mortgage transaction is clearly a consumer transaction, such a transaction is also a business  
3 transaction for the lender who is in the business of loaning money to consumers. Thus, the  
4 lender is acting in a business-capacity with a business need for the information. To put it  
5 another way, while the consumer is initiating a consumer transaction to buy a home, the  
6 lender who decides to lend that consumer money is entering into a "business transaction"  
7 initiated by the consumer. Thus, in this transaction, the lender requesting the consumer  
8 report has a legitimate business need for the information in connection with a business  
9 transaction initiated by the consumer and, therefore, this transaction would fall under the  
10 coverage of § 1681b(a)(3)(F) as a proper purpose for obtaining a consumer report. This  
11 interpretation is consistent with the language and the purpose of § 1681b(a)(3)(F), which is  
12 to regulate when a CRA can permissibly furnish a "consumer report" on a "consumer" to a  
13 third-party.

14 Finally, other Circuits, including the Ninth Circuit, have given a narrow interpretation  
15 to the "business transaction" language of § 1681b(a)(3)(F), which is contrary to Plaintiff's  
16 interpretation. In *Mone v. Dranow*, the Ninth Circuit narrowly interpreted the language of  
17 § 1681b(3)(E)<sup>5</sup>. *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991). The Ninth Circuit found  
18 that "Congress intended the FCRA to authorize a credit reporting agency to issue a consumer  
19 report to determine 'an individual's eligibility for credit, insurance or employment.'" *Id.*  
20 (citing 116 Cong.Rec. 36,572 (1970) (Statement of Rep. Sullivan)). Thus, the Ninth Circuit  
21 determined "[r]eports used for 'business, commercial, or professional purposes' are not  
22 within the purview of the statute." *Id.* Accordingly, reports used for business, commercial  
23 or professional purposes do not fall within the lawful "business need" purpose for obtaining  
24 a consumer report. *Id.* A lawful "business need" must be related to eligibility for credit,  
25 insurance eligibility, employment or licensing. *Id.*

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27 <sup>5</sup> On September 30, 1997, §1681b(3)(E), which read "otherwise has a legitimate business need for the  
28 information in connection with a business transaction involving a consumer", was amended to § 1681b(a)(3)(F).



1 In interpreting the “business transaction” language, the Ninth Circuit turned to the  
2 Third Circuit, in *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1149 (3d Cir. 1986),  
3 where the Third Circuit also concluded that to fall within the business need exception, a  
4 transaction “must relate to one of the other specifically enumerated transactions in  
5 §§1681a(d) and b(3), i.e., credit, insurance eligibility, employment or licensing.” *Mone*, 945  
6 F.2d at 308. The Ninth Circuit also noted that most district courts reached similar  
7 conclusions. *Id.* (citing e.g., *Russell v. Shelter Financial Services*, 604 F. Supp. 201, 202-203  
8 (W.D. Mo. 1984) (acquisition of credit report to ascertain whether former employee had been  
9 embezzling funds was not permissible); *Boothe v. TRW Credit Data*, 557 F. Supp. 66, 70  
10 (S.D.N.Y. 1982) (investigating plaintiff for suspected counterfeiting activities was an  
11 impermissible purpose under § 1681b(3)(E) because there was no consumer relationship  
12 between private investigative agency and plaintiff); *Cochran v. Metropolitan Life Ins. Co.*,  
13 472 F. Supp. 827, 830-831 (N.D. Ga.1979) (FCRA covers reports prepared to determine  
14 eligibility for insurance coverage, but not reports compiled to evaluate claims for benefits)).

15 In *Ippolito*, the Seventh Circuit explained that “[i]f Congress intended information  
16 concerning any ‘business transaction’ involving a consumer to fall within the definition of a  
17 consumer report, there would have been no reason to place into the statute § 1681a(d)’s  
18 precisely drawn language referring to information ‘used or expected to be used or collected  
19 ... for the purpose of serving as a factor in establishing the consumer’s eligibility for (1) credit  
20 or insurance to be used primarily for personal, family, or household purposes, or (2)  
21 employment purposes....” *Ippolito*, 864 F.2d at 451. The Seventh Circuit went on to state  
22 that “[i]f such a catch-all reading of [§ 1681b(a)(3)(F)] ... is derived, the specifics of the  
23 preceding sections and subsections are rendered meaningless. There is no reason to  
24 enumerate covered reports if ultimately all reports are included. An allowance of any other  
25 imaginable reports involving consumers would logically conflict with the precision and  
26 specifics of § 1681a.” *Id.* at 451. The Seventh Circuit noted:

27 The primary purpose of § 1681a(d) is to define the term “consumer report.” To  
28 effectuate that primary purpose, that section’s precisely drawn language should

1 take precedence over § 1681b when a court is examining whether a particular  
2 report falls within the definition of a “consumer report.” On the other hand, the  
3 primary purpose of § 1681b is to set forth the permissible purposes for which  
4 a consumer report may be furnished by a consumer reporting agency. In  
5 determining whether a “consumer report” was disseminated for a permissible  
6 purpose, [§ 1681b(3)(F)s] broader language should then take precedence over  
§ 1681a(d)’s more restrictive language. In other words, information that is  
collected and used for business transactions does not fall within the definition  
of a consumer report. But the mere fact that information is collected for a  
consumer purpose does not prevent that information from subsequently being  
furnished to a person who has a legitimate business need for the information.

7 *Ippolito*, 864 F.2d at 451.

8 The Sixth Circuit also observed that “[o]ur sister circuits have rebuffed efforts, based  
9 on expansive interpretations of § 1681b, to extend the Act beyond its original purpose of  
10 consumer protection. *Cheatham v. McCormick*, 100 F.3d 956 (6th Cir. 1996) (citing *Mone*,  
11 945 F.2d at 308; *Ippolito*, 864 F.2d at 452; *Matthews v. Worthern Bank & Trust Co.*, 741  
12 F.2d 217 (8th Cir. 1984) (holding that a credit report on a prospective lessee of commercial  
13 real estate was not subject to the Act) (emphasis in original)). And, while the Eleventh Circuit  
14 in *Hovater v. Equifax, Inc.*, 823 F.2d 413, 419 (11th Cir. 1987) (citing *Houghton*, 795 F.2d at  
15 1150 (Sloviter, J. concurring)), recognized that there are “thoughtful reasons” against giving  
16 the “business transaction” language too narrow an interpretation, no court has given it such  
17 a broad and all-inclusive interpretation as to include all of an individual’s business and  
18 commercial transactions merely because they were initiated by that individual. Accordingly,  
19 Plaintiff’s argument that his business and commercial transactions fall under the definition  
20 of a consumer report merely because they were business transactions he initiated is without  
21 merit. In order to meet his burden of proving actual damages under the FCRA, Plaintiff must  
22 show that each transaction at issue involved the use of a consumer report. If he cannot make  
23 that causal connection, his alleged actual damages are not recoverable under the FCRA.

24 Plaintiff has produced no evidence that a consumer report was used in any of his  
25 alleged damage claims; thus, the court reiterates its prior decision that Plaintiff’s business  
26 and commercial transactions are not subject to the FCRA (Doc. #70). Defendant, on the  
27 other hand, has attached evidence that indicates consumer reports may have been used in  
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1 some of the transactions giving rise to Plaintiff's alleged damages. Accordingly, to ensure  
2 only proper alleged damage claims remain, the court addresses each of Plaintiff's alleged  
3 damages subject to this motion, including Plaintiff's business and commercial transactions.<sup>6</sup>

4 **1. Dove Street Capital Lenders (the "Dove Street Loan")**

5 Plaintiff claims \$800,000 in damages for having to pay higher interest rates and fees  
6 on a \$3,570,000 commercial loan (the "Dove Street Loan") obtained to purchase the  
7 Vancouver Commercial Properties because Plaintiff was unable to refinance the loan (Doc.  
8 #105 at 7). This loan was obtained to purchase a 24-unit apartment, a strip shopping center,  
9 commercial space and condominiums in Vancouver, Washington (*Id.* at 20). Plaintiff claims  
10 this loan "was to be a short term bridge loan until I could refinance the three commercial  
11 properties (*Id.*, Exh. J).

12 The promissory note for this loan expressly states "[m]aker is engaging in this loan  
13 transaction exclusively for business or commercial purposes and not for any personal, family  
14 or household purpose." (*Id.*, Exh. M). Plaintiff does not dispute this transaction was a  
15 commercial transaction, nor does he argue that the CRAs believed they were collecting  
16 information related to this transaction for a consumer purpose, rather than a business or  
17 commercial purpose. Thus, no consumer report was involved in this loan transaction and it  
18 is not subject to the FCRA. Furthermore, Vancouver R.E. Investments LLC entered into the  
19 promissory note associated with this loan; thus, Plaintiff, as an individual consumer, was not  
20 a borrower on this loan (Doc. #105, Exh. M). The FCRA only protects individual consumers,  
21 not business entities, and any damages associated with this loan were suffered by Vancouver  
22 R.E. Investments LLC, not Plaintiff as an individual consumer. Accordingly, these damages  
23 are not recoverable under the FCRA.

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27 <sup>6</sup> The court notes that Plaintiff did not dispute Defendant's factual background and summary of Plaintiff's  
28 alleged damages. Therefore, the court assumes Defendant's statements with regard to each transaction are  
accurate and undisputed.

**2. Loans from family and friends to pay the Dove Street Loan monthly payments (\$50,000 - parents; \$105,000 - Randall Wright; \$325,000 - Lloyd Austin)**

Plaintiff alleges he had to borrow money from his parents, Randall Wright and Lloyd Austin in order to pay the \$45,000 monthly payments on the Dove Street loan listed above (Doc. #105 at 20).

First, Plaintiff does not dispute that he borrowed money for the sole purpose of paying the monthly payment on a commercial loan; thus, these loans are business-purpose loans not subject to the FCRA. Furthermore, Plaintiff has not alleged a consumer report containing the erroneous information played any role in these transactions; therefore, Plaintiff has failed to show how Defendant's violation caused him harm in these loan transactions. Plaintiff merely alleges he needed to borrow money from family and friends because he could not obtain business and commercial loans elsewhere. Plaintiff has pointed to no provision in the FCRA or to any case law supporting his contention that loans from family and friends made to cover his commercial loan payments somehow fall under the protections of the FCRA.

Second, even if borrowing money from family and friends is consumer in nature, Plaintiff failed to show that his family and friends somehow relied on the erroneous information reported by Defendant to Plaintiff's detriment in lending Plaintiff money. Accordingly, Plaintiff has failed to causally link these loans to Defendant's violation as required under the FCRA. Plaintiff does not claim that, based on the erroneous information reported by Defendant, his friends and family members charged him higher interest rates or excessive fees, or even loaned Plaintiff less money because they thought he was a credit risk. To the contrary, Plaintiff claims he paid a high interest rate on a \$50,000 loan from his stepfather because that money was tied up on second trust deeds and he "wasn't gonna turn around and take money out of his pocket that he couldn't get elsewhere." (Doc. #105, Exh. A, p. 77). Plaintiff does not claim his step-father charged him a higher interest rate because of the information reported by Defendant to the CRAs.

1 Without the causal link, Plaintiff cannot prove actual damages. For example, if a  
2 plaintiff is unable to obtain a home mortgage due to inaccurate information contained in his  
3 credit report, he may be able to recover his actual damages associated with the denial of  
4 credit. Now suppose the plaintiff borrows \$300,000 from his parents to purchase the home.  
5 Plaintiff could not recover damages from the furnisher for the first denial of credit and the  
6 \$300,000 his parent's loaned him to buy his home. To allow such damages would put the  
7 plaintiff in a better position than he was in prior to the inaccurate reporting. Ultimately, the  
8 defendant would be paying for the plaintiff's home. If, on the other hand, the plaintiff could  
9 show he would have obtained a \$300,000 loan from another source at a lower interest rate  
10 but for the inaccurate information *and* his parents charged him a higher interest rate *because*  
11 *of* the inaccurate information contained in his credit report, then he may be able show he  
12 suffered actual damages in the loan from his parents. Plaintiff has not made such a showing  
13 here.

14 Under these facts, Plaintiff has failed to make the causal link between any of these  
15 loans and Defendant's violation in order to show he was damaged by such loans in his  
16 consumer-capacity. Nor has he shown that any of his family and friends relied, to his  
17 detriment, on the erroneous information reported by Defendant. Accordingly, these loans  
18 are not subject to the FCRA.

### 19 **3. Southern Oregon Investment Group (SOIG)**

20 \_\_\_\_\_Plaintiff alleges he suffered \$426,176 in damages by having to borrow funds from  
21 Southern Oregon Investment Group (SOIG). Defendant asserts SOIG is a hard money lender  
22 who brokers money for private investors (Doc. #105 at 8). Defendant further asserts SOIG  
23 brokered the Dove Street Loan and several other hard money loans for Tahoe Reno  
24 Development and Vancouver R.E. totaling \$1,935,000 (*Id.*). Defendant asserts all the loans  
25 made by SOIG investors and other entities owned by Mr. Chris Thompson (owner of SOIG)  
26 contain the following provision" "[m]aker is engaging in this loan transaction exclusively for  
27  
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1 business and commercial purposes and not for any personal, family or household purposes.”  
2 (Doc. #105 at 9).

3 Plaintiff does not dispute that his loan documents dealing with any of the SOIG  
4 transactions at issue contained the express provision above, nor does he argue that the CRAs  
5 believed they were collecting any information related to these loans for a consumer purpose,  
6 rather than a business or commercial purpose. The language of the loan provision is  
7 unambiguous – the loan transactions were exclusively for business and commercial purposes.  
8 Furthermore, the evidence shows Tahoe Reno Development, LLC and Vancouver R.E. entered  
9 into the various promissory notes associated with SOIG, not Plaintiff as an individual  
10 consumer (*Id.*, Exh. P). The FCRA only protects individual consumers, not business entities,  
11 thus any damages sustained by these business entities are not recoverable under the FCRA.  
12 Additionally, no consumer reports were involved in these loan transactions; thus, they are not  
13 subject to the FCRA.<sup>7</sup>

#### 14 **4. Late fees and costs on rental properties**

15 \_\_\_\_\_Plaintiff alleges \$89,640 in damages for late fees and costs his companies incurred  
16 because they were making their mortgage payments late (Doc. #105 at 9). All late fees, except  
17 those related to the Erna Way and James Lane properties, were paid by Plaintiff’s limited  
18 liability companies (*Id.*). As previously explained, the FCRA only protects individual  
19 consumers and not business entities; therefore, any late fees incurred by Plaintiff’s limited  
20 liability companies are not recoverable under the FCRA. Furthermore, any late fees Plaintiff  
21 incurred and paid related to his business and commercial transactions are not consumer  
22 transactions; thus, they are not subject to the FCRA.

23 Plaintiff also alleges he suffered \$5,410.24 in damages for foreclosure late fees on  
24 5102-5108 Fessenden in Portland, Oregon; however, it appears Portland R.E. owns this rental

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26 <sup>7</sup> In his deposition, Plaintiff does indicate he borrowed \$150,000 from Mr. Thompson to finish his  
27 personal house. To the extent this loan is a consumer loan, it is subject to the FCRA (Doc. #105 , Exh. A, p. 29).  
28 At this point, however, Plaintiff has produced no evidence indicating Mr. Thompson relied on the erroneous  
information reported by Defendant with regard to this loan.

1 property and paid the fees associated with this property (Doc. #105 at 9-10). Portland R.E.  
2 is a business entity, not a consumer; therefore, any late fees incurred by Portland R.E. are not  
3 recoverable under the FCRA.

4 **5. James Lane property**

5 Plaintiff alleges \$880,000 in damages as a result of being unable to refinance and  
6 finish construction on the James Lane Property (*Id.* at 10). Plaintiff also alleges \$12,000 in  
7 attorney's fees associated with fees incurred to pay off the seller of the James Lane property  
8 (*Id.*). Finally, Plaintiff alleges \$39,520 in damages due to higher interest rates associated  
9 with this property (*Id.*). Defendant asserts that The Deed of Trust related to this property  
10 expressly states: "[m]aker is engaging in this loan transaction exclusively for business or  
11 commercial purposes and not for personal, family or household purposes." (*Id.* at 22).

12 Plaintiff states in his deposition that the James Lane Property is his personal residence  
13 and he was unable to finish construction on his personal residence due to Defendant's  
14 violation (*Id.*, Exh. A., p. 65). Plaintiff further states the seller of the James Lane Property  
15 filed a lawsuit against him when he couldn't refinance the second mortgage the seller carried  
16 on the property and he incurred legal fees in order to avoid the seller putting the property in  
17 foreclosure (*Id.* at 72). Although the Deed of Trust states this loan transaction is exclusively  
18 for business or commercial purposes, given this property is the personal residence of Plaintiff,  
19 it is unclear whether any of the other transactions associated with this property, *e.g.*, the  
20 second mortgage carried by the seller and any attempts to refinance that loan, were  
21 consumer-related or strictly business-related transactions. As such, under these facts, there  
22 are genuine issues of material fact in dispute as to whether Plaintiff suffered actual damages  
23 in his consumer-capacity related to this property. If Plaintiff was acting in his consumer-  
24 capacity with respect to any transactions associated with this property during the relevant  
25 time frame, Plaintiff may be entitled to actual damages if he can make the causal link between  
26 those damages and Defendant's violation.

27 ///



1           **6.     *Anticipated profits on Cashill subdivision***

2           \_\_\_\_ Plaintiff alleges \$6,250,000 in lost profits due to his inability to develop as many lots  
3 as anticipated in the Cashill subdivision because, during the time he was unable to obtain  
4 financing, the City of Reno changed the hillside ordinance to allow for fewer lots (Doc. #105  
5 at 28-29, Exh. A, p. 73-75). Specifically, Plaintiff alleges Defendant is responsible for his  
6 inability to finance a lawsuit against the City of Reno and pay his engineers to draft new plans  
7 prior to the City of Reno changing the Hillside Ordinance (*Id.* at 11). Plaintiff claims that the  
8 City of Reno changed the Hillside Ordinance from a maximum of 70 lots to 28 lots during the  
9 time Plaintiff's finances were affected by Defendant's reporting, and due to his financial  
10 difficulties, he was unable to develop the property prior to the ordinance change and was also  
11 unable to finance a lawsuit against the City of Reno regarding this change (*Id.*, Exh. B, p. 27,  
12 Exh. K, p. 4, Exh. T). Plaintiff blames Defendant for the 2003 lawsuit lasting until 2005  
13 because he didn't have enough money to process the lawsuit faster and "turn around and, and  
14 re-engineer everything to push it forward with a new application." (*Id.*, Exh. B, p. 31-34).

15           Defendant contends the successful development and sale of these lots depends upon  
16 the City of Reno's approval of the tentative map, state of the market and many other  
17 contingencies (*Id.* at 29). Defendant further asserts it is impossible to determine the profit,  
18 if any, Tahoe Reno Development would have derived from the sale of the lots in this  
19 subdivision (*Id.*). Ultimately, Defendant argues Plaintiff's damages are too speculative.

20           Plaintiff responds that his anticipated real estate profits are not speculative because  
21 he has been buying, holding and selling real estate prior to Defendant's noncompliance and  
22 there are other companies buying and selling real estate throughout the areas where Plaintiff  
23 owned his properties (Doc. #112 at 6). Thus, Plaintiff argues that there is information  
24 available to the public which provides many different statistics and trends within the real  
25 estate market and the profits from the development of the Cashill subdivision are not  
26 speculative because similar properties in Reno were developed in known quantities (*Id.*).

1 First, Plaintiff does not deny that these alleged damages relate to Plaintiff's business  
2 of "buying, holding and selling real estate." (Doc. #112 at 6). Plaintiff claims he searched for  
3 the money to develop these lots, which is why he went to U.S. Bank (Doc. #105, Exh. A, p.  
4 76). For the reasons set forth in great detail above, any credit reports used in connection with  
5 obtaining financing for these transactions are not subject to the FCRA because these  
6 transactions are commercial transactions.

7 Second, although Plaintiff asserts he tried to use his personal residence as collateral  
8 on a development loan, Plaintiff has not argued that the CRAs believed they were collecting  
9 any information related to his attempts to obtain financing for consumer rather than  
10 commercial purposes. As the *Boothe* court explained, to which the Ninth Circuit cited: "It is  
11 clear from its legislative history that the Act was intended to apply only to reports which  
12 relate to the consumer's eligibility for personal credit or other commercial benefits as a  
13 consumer, and not to the consumer's business transactions." *Boothe*, 523 F. Supp. at 633.  
14 Accordingly, without the use of a consumer report, any lost business opportunities and  
15 anticipated profits relating to Plaintiff's inability to buy, hold and sell real estate are business  
16 damages not recoverable under the FCRA.

17 Third, Plaintiff has failed to make the necessary causal link between his status as a  
18 consumer and Defendant's violation with regard to his inability to finance a lawsuit against  
19 the City of Reno regarding an ordinance change. The evidence indicates the lawsuit at issue  
20 was brought by W.W. Johnson Development Corporation and Leonard Detrick (Doc. #105,  
21 Exh. W). Plaintiff, individually, was not a party to this lawsuit; thus, Plaintiff cannot claim  
22 consumer damages stemming from a lawsuit brought by his corporation. Furthermore, even  
23 if the inability to "finance a lawsuit" is a cognizable damage claim under the FCRA, under  
24 these facts, Plaintiff has failed to make the necessary causal connection between Defendant's  
25 violation and Plaintiff's inability to finance a lawsuit that wholly unrelated to Defendant's  
26 violation against a third-party.

27 ///

1           **7.     *Detrick Loan***

2       \_\_\_\_ Plaintiff alleges \$168,000 in damages because Tahoe Reno Development had to pay  
3 extension fees on the loan it obtained from Leonard Detrick to purchase the Cashill  
4 subdivision (Doc. #105 at 11-12).

5       Plaintiff, as an individual consumer, was not a borrower on the Detrick loan (*Id.* at 22,  
6 Exh. Y). The FCRA only protects individual consumers, not business entities; thus, any fees  
7 paid or damages incurred by Tahoe Reno Development are not recoverable under the FCRA.

8           **8.     *Erna Way***

9       Plaintiff alleges \$46,000 in damages as a result of having to pay extra interest and fees  
10 associated with refinancing this property (*Id.* at 13). Defendant asserts Plaintiff's purpose in  
11 refinancing this rental property was to obtain money to pay the \$45,000 monthly payment  
12 on the Dove Street Loan (*Id.* at 22).

13       Plaintiff does not dispute this property is a rental property. Nor does he dispute that  
14 he refinanced this property in order to pay the \$45,000 monthly payment on the Dove Street  
15 Loan. The record indicates Plaintiff eventually obtained the funds to refinance this property  
16 from United Security Financial (*Id.*, Exh. BB). The record also indicates, however, that  
17 Plaintiff, as an individual, borrowed funds to refinance this property (*Id.*). There is no  
18 "commercial purpose" provision in the loan agreement. Furthermore, the loan applications  
19 associated with this transaction are residential loan applications in which Plaintiff,  
20 individually, is the borrower on each application (*Id.*, Exh. AA).

21       Under these facts, although Plaintiff lists rental income associated with this property  
22 on the loan applications and admits this property is a rental property, there are genuine  
23 issues of material fact as to whether the CRAs believed they were collecting information with  
24 regards to these loan applications for consumer purposes. If so, a consumer report was likely  
25 involved in these transactions, thus, subjecting them to the FCRA. If Plaintiff shows he  
26 applied for these loans as a consumer and was denied credit or suffered some other damages  
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28

1 as a result of the erroneous information reported by Defendant contained in his consumer  
2 report, he will be entitled to any actual damages sustained.

3 **9. Sale of 21 properties**

4 Plaintiff alleges \$11,741,500 in damages for lost profits from having to sell twenty-one  
5 (21) properties earlier than anticipated (Doc. #105 at 28). Plaintiff further alleges \$683,800  
6 in damages for lack of cash flow on these properties (*Id.* at 13).

7 After purchasing the properties at issue, Plaintiff apparently transferred said  
8 properties to his limited liability companies (*Id.*). Plaintiff does not dispute that he was not  
9 the owner of the properties in question at the time of the sales. Accordingly, any anticipated  
10 profits and cash flow would have been realized by Plaintiff's limited liability companies and  
11 not Plaintiff. And any losses associated with these sales would also have be realized by  
12 Plaintiff's limited liability companies, as well. Because the FCRA only protects individual  
13 consumers, losses to Plaintiff's limited liability companies are not recoverable under the  
14 FCRA.

15 **10. Lost business opportunities on 50 transactions**

16 Plaintiff alleges \$9,420,450 in damages for lost business opportunities to purchase  
17 real estate on approximately fifty (50) transactions (*Id.*). Defendant asserts Plaintiff has  
18 provided no evidence of a credit report being obtained in connection with any business  
19 opportunity he was denied due to Defendant's reporting and any real estate transaction he  
20 would have entered would have been for a business purpose (*Id.* at 24).

21 In the Ninth Circuit, a denial of credit is not a prerequisite to recovery under the  
22 FCRA. *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995).  
23 However, Plaintiff must still prove his alleged damages were caused by Defendant's failure  
24 to comply with the FCRA, which as explained in detail *supra*, is done through the use of a  
25 consumer report. Plaintiff is not entitled to business damages unrelated to his status as a  
26 consumer as the FCRA was designed to protect the individual consumer, not the individual's  
27 businesses. Plaintiff has failed to show a consumer report was involved in any of these fifty  
28

(50) transactions. Nor has Plaintiff argued a CRA believed it was collecting information for a consumer purpose in any of these fifty (50) transactions. Accordingly, these transactions are not subject to the FCRA.

**11. Sky T Stock**

Plaintiff alleges \$25,000 in damages as a result of having to sell his Sky T stock early in order to pay the Dove Street Loan monthly payments (Doc. #105 at 23). Plaintiff asserts that “[b]ut for the financial position the Plaintiff found himself in because of Defendant’s non-compliance with the FCRA, he would not have sold the stock when he did (Doc. #112 at 6). Plaintiff further asserts the stock split after he was forced to sell and the stock value today is \$25,000 higher than it was at the time he was forced to sell (Doc. #105 at 15).

Defendant argues fluctuations in the stock market are too speculative and uncertain on which to base an award of damages (Doc. #105 at 29).

As previously explained, a denial of credit is not a prerequisite to recovery under the FCRA; however, Plaintiff must show his damages were, in fact, caused by Defendant’s failure to comply with the FCRA. *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). There must be a causal relation between Defendant’s violation and the alleged harm. In other words, the decision that resulted in the alleged harm must have been made based on the erroneous information reported by Defendant, which was contained in a consumer report.

Here, the alleged harm is Plaintiff’s decision to sell his stock prematurely. Plaintiff asserts he made the decision to sell his stock early based on the erroneous information Defendant reported to the CRAs. Plaintiff also asserts he ran his credit every month (Doc. #105, Exh, A, p. 67). Thus, the question becomes whether Plaintiff’s decision to sell his stock prematurely because of Defendant’s erroneous reporting, which he obtained when he ran his credit and obtained a consumer report, constitutes actual damages recoverable under the FCRA.

1 While Plaintiff does state he was forced to sell his stock because he needed the money  
2 to make his \$45,000 monthly Dove Street Loan payments, Plaintiff also states he was  
3 “scrambling” and had to refinance every piece of property he owned to keep his head above  
4 water (Doc. #105, Exh. A, p. 77). It is unclear whether Plaintiff was scrambling to keep his  
5 head above water solely in his business-capacity or in his consumer-capacity, as well.  
6 Viewing the facts and the evidence in the light most favorable to Plaintiff, there are genuine  
7 issues of material fact as to whether these alleged damages are cognizable under the FCRA.  
8 In the event such damages are cognizable, which will be determined at the time of trial, the  
9 court will then consider whether Plaintiff’s stocks are too speculative and uncertain to base  
10 an award of damages.

11 **12. Interest on son’s student loans**

12 Plaintiff alleges \$4,576 in damages for interest he paid on his son’s college loans  
13 because he was unable to pay off the balances as promised (Doc. #105 at 15, Exh. HH).  
14 Plaintiff asserts he agreed to pay off his son’s college loans if his son received a degree in  
15 Business Administration and his son graduated in December 2004 (*Id.*, Exh. HH). Plaintiff  
16 asserts he has been unable to take care of this obligation and, instead, has had to pay the  
17 interest on these loans (*Id.*).

18 Plaintiff has failed to make any casual connection between his son’s student loans and  
19 the erroneous information reported by Defendant obtained in Plaintiff’s consumer report.  
20 Even if Plaintiff borrowed these loans on his son’s behalf, these loans were made prior to  
21 Defendant’s reporting and, thus, any credit reports involved in these loan transactions would  
22 not have contained the erroneous information. Plaintiff cannot claim damages for interest  
23 he pays on his own loans obtained prior to Defendant’s erroneous reporting simply because  
24 he was planning to pay them off. Yet, he attempts to do that here with his son’s student loans.

25 Plaintiff must prove causation between his alleged damages and Defendant’s violation  
26 and, while normally the issue of causation is left for a fact finder to determine, Plaintiff must  
27 at least allege his damages were a result of inaccuracies in his consumer report or provide  
28

1 evidence to support his theory of liability. *Guimond*, 45 F.3d at 1333. Plaintiff has failed to  
2 provide any evidence to support his theory of liability that Defendant's violation affected his  
3 business, which in turn affected finances, which in turn affected his ability to keep his  
4 promise to his son to pay off his son's student loans. Furthermore, the evidence shows these  
5 loans are Plaintiff's son's loans, borrowed in his son's name; therefore, any damages resulting  
6 from Plaintiff's failure to keep his promise to his son were suffered by his son and not by him.  
7 Accordingly, these alleged damages are not recoverable under the FCRA.

### 8 **13. Credit cards**

9 Plaintiff alleges his credit limits were decreased on his Providian and Bank of America  
10 credit cards (Doc. #105 at 15).<sup>8</sup> Defendant contends Plaintiff used these credit cards for  
11 business purposes, such as financing improvements and refurbishments made to Plaintiff's  
12 companies' rental properties; therefore, any credit reports used in connection with these  
13 credit cards was for business purposes (*Id.*).

14 Plaintiff does not dispute that he used the credit cards at issue for business purposes.  
15 However, the evidence shows that, in a letter dated December 21, 2004, Plaintiff was notified  
16 that his Bank of America credit card limit was reduced and that letter expressly states "[i]n  
17 reaching our decision, we relied on internal information as well as information in the  
18 *consumer credit report* of the first person named above." (*Id.* (emphasis added)). Thus, even  
19 if Plaintiff used this credit card for business purposes, a consumer report was involved in the  
20 decision to reduce Plaintiff's line of credit and, therefore, this transaction is subject to the  
21 FCRA. Likewise, in a letter dated January 20, 2005, Plaintiff was notified that his Providian  
22 credit limit was being reduced (*Id.*, Exh. JJ). This letter also indicates a consumer report was  
23 involved in this transaction, as the letter expressly states "[w]e received credit information  
24 from TransUnion *Consumer* Relations ..." (*Id.* (emphasis added)). Thus, again, although  
25 Plaintiff may have used this credit card for business purposes, the evidence shows a consumer  
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27 <sup>8</sup>Defendant contends that Plaintiff claims credit limits were decreased on four credit cards, but Plaintiff  
28 has only provided evidence for these two cards. Plaintiff did not dispute this contention.



1 report was, in fact, involved in the decision to reduce Plaintiff's line of credit and, therefore,  
2 this transaction is also subject to the FCRA. Accordingly, these damages are recoverable  
3 under the FCRA if Plaintiff can show the credit limits were reduced because of Defendant's  
4 erroneous reporting.

5 **14. Credit lines**

6 Plaintiff alleges damages for denials of credit when he attempted to obtain a \$500,000  
7 credit line from U.S. Bank and from Nevada National Bank in order to complete  
8 improvements on commercial properties located in Vancouver, Washington and to pay off  
9 the Dove Street Loan (Doc. #105 at 24).

10 Plaintiff does not dispute he applied for a line of credit for business purposes; however,  
11 Plaintiff does allege he attempted to obtain this line of credit on his personal residence (*Id.*,  
12 Exh. O). Under these facts, there are genuine issues of material fact as to whether a consumer  
13 report containing the erroneous information reported by Defendant was involved in the  
14 decisions to deny Plaintiff's applications for credit. In other words, despite Plaintiff's purpose  
15 for obtaining the line of credit, it is unclear whether he applied for said credit as a consumer  
16 with the intent to use the credit for a business purpose. It is also unclear whether the CRAs  
17 believed they were collecting the information for a consumer purpose. If Plaintiff can show  
18 that he was denied the credit at issue because of erroneous information reported by  
19 Defendant contained in a consumer report, these damages are recoverable under the FCRA.  
20 No evidence has been produced either proving or disproving the use of a consumer report;  
21 therefore, the court will allow Plaintiff to proceed through trial on these alleged damages.

22 For the reasons set forth above, summary judgment on Plaintiff's actual damage claims  
23 subject to the instant motion are **GRANTED in part** and **DENIED in part** as set forth at  
24 the end of this order.

25 **C. Statutory Damages**

26 Section 1681n provides for statutory damages for a willful noncompliance with the  
27 FCRA. Specifically, § 1681n(a)(1)(A) provides that "[a]ny person who willfully fails to comply  
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1 with any requirement imposed under this subchapter with respect to any consumer is liable  
 2 to that consumer in an amount equal to the sum of any actual damages sustained by the  
 3 consumer as a result of the failure *or* damages of not less than \$100 and not more than  
 4 \$1,000.” 15 U.S.C. § 1681(n)(1)(A) (emphasis added).

5 There are genuine issues of material fact as to whether Plaintiff can prove any actual  
 6 damages; however, even absent actual damages, if Plaintiff proves a willful noncompliance  
 7 with the FCRA, he will be entitled to statutory damages. On this basis, summary judgment  
 8 is inappropriate at this time and must be **DENIED**.

#### 9 **D. Punitive Damages**

10 Section 1681n also provides for punitive damages at the court’s discretion for a willful  
 11 noncompliance with the FCRA. 15 U.S.C. § 1681n(a)(2). Thus, if Plaintiff proves a willful  
 12 noncompliance with the FCRA, he may be entitled to punitive damages. Accordingly,  
 13 summary judgment is inappropriate at this time and must be **DENIED**.<sup>9</sup>

#### 14 **30-DAY REINVESTIGATION PERIOD AND WHEN LIABILITY ATTACHES**

15 Defendant contends that, as a matter of law, it cannot be held liable for Plaintiff’s  
 16 business losses that predate its alleged failure to reinvestigate (Doc. #105 At 24-27).  
 17 Defendant asserts, therefore, that the earliest it can be held liable for any damages sustained  
 18 by Plaintiff is January 14, 2005, thirty (30) days after the December 14, 2004 Credit Report  
 19 Dispute Form was filed by Plaintiff (*Id.* at 26).

20 Plaintiff simply argues Defendant does not cite to any legal authority to support its  
 21 contention (Doc. #112 at 5).

22 Section 1681s-2(b) imposes a duty of reinvestigation on furnishers of information,  
 23 which arises when a furnisher receives notice of a dispute regarding the accuracy of  
 24 information they provided to a CRA. 15 U.S.C. § 1681s-2(b)(1). Section 1681s-2(b)(2) further  
 25 provides that “[a] person shall complete all investigations, reviews and reports required  
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27 <sup>9</sup> Whether Plaintiff has sufficiently pled a willful violation to sustain a punitive damages claim is discussed  
 28 in further detail *infra*.

1 under paragraph (1) ... before the expiration of the period under section 1681i(a)(1) of this  
2 title within which the consumer reporting agency is required to complete actions required by  
3 that section regarding that information.” 15 U.S.C. § 1681s-2(b)(2).

4 The Ninth Circuit has made clear that a furnisher’s duty to reinvestigate is not  
5 triggered until *after* the consumer notifies the CRA *and* the CRA then notifies the furnisher.  
6 *See Nelson*, 282 F.3d at 1060. Furthermore, the Ninth Circuit has expressly held that “[t]he  
7 FCRA does not impose strict liability ...” *Guimond*, 45 F.3d at 1333. Just as a CRA can escape  
8 liability by establishing that an inaccurate report was generated despite the CRA following  
9 reasonable procedures; so, too, can a furnisher escape liability by showing that it properly  
10 reinvestigated the disputed information. Accordingly, liability cannot attach until a furnisher  
11 violates its duty to properly reinvestigate. A furnisher has thirty (30) days to properly  
12 reinvestigate. Thus, no violation can occur until after the 30-day deadline for completing a  
13 proper reinvestigation has expired.

14 Other district courts have drawn similar conclusions. In *Acton v. Bank One*  
15 *Corporation*, 293 F. Supp. 2d 1092, 1100 (D. Ariz. 2003), the district court found the plaintiff  
16 could not have been damaged by the CRA’s failure to comply with § 1681i until the 30-day  
17 reinvestigation period expired. *See* 15 U.S.C. § 1681i(a)(1)(A). In *Acton*, the plaintiff claimed  
18 he was damaged by his inability to purchase a home; however, the evidence showed the  
19 plaintiff cancelled the contract more than two weeks prior to the expiration of the 30-day  
20 reinvestigation period. *Id.* Because the plaintiff cancelled the home purchase prior to the  
21 expiration of the reinvestigation period, the court found the CRA’s failure to reinvestigate did  
22 not cause the cancellation and, therefore, could not have formed the basis for actual damages  
23 under the FCRA. *Id.* The Court expressly agreed with the defendant’s contention that  
24 “Plaintiff could not have been damaged by Equifax’s failure to comply with § 1681i until the  
25 30-day reinvestigation period expired.” *Id.*

26 In *Lawrence v. Trans Union LLC*, 296 F. Supp. 2d 582, 587 (E.D. Pa. 2003), the  
27 district court also expressly found that “liability arises under 1681i thirty days after the  
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1 consumer reporting agency receives notice of the disputed item from the consumer.” Section  
2 1681s-2(b)(2) explicitly refers back to § 1681i in determining when the investigations, reviews  
3 and reports required under this section are due. Thus, if liability under § 1681i does not  
4 attach until after the 30-day reinvestigation period expires and § 1681s-2(b)(2) refers us back  
5 to § 1681i’s 30-day reinvestigation period, then liability under § 1681s-2(b) also does not  
6 attach until after the expiration of that same reinvestigation period.

7 This court’s interpretation is further supported by the Ninth Circuit, in *Guimond*,  
8 where the Ninth Circuit expressly found that in order to prove a CRAs liability under §  
9 1681i(c), the plaintiff must show she disputed an item in her file *and* that any reinvestigation  
10 conducted by the CRA did not resolve the dispute. *Guimond*, 45 F.3d at 1335. In order to  
11 show that any reinvestigation conducted by the CRA did not resolve the dispute, the 30-day  
12 reinvestigation period must have necessarily expired. Similarly, in order to show any  
13 reinvestigation conducted under § 1681s-2(b) by a furnisher of information did not resolve  
14 the dispute, the 30-day reinvestigation period must have expired.

15 While Plaintiff argues that Defendant cites to no legal authority to support its  
16 contention that it is not liable for any damages predating its duty to reinvestigate, Plaintiff  
17 cites to no authority to dispute this contention; but, rather, briefly states that because  
18 Defendant cites to none, Defendant’s motion must be denied. This court’s reading of the  
19 statute and the persuasive authority cited above supports Defendant’s contention. Plaintiff  
20 filed a Credit Report Dispute Form on December 4, 2004 (Doc. #105 at 26). Assuming  
21 Defendant was properly notified of the disputed information on that same date, Defendant’s  
22 liability under § 1681s-2(b) would not attach until thirty (30) days later. Accordingly,  
23 Defendant’s request for summary judgment on damages predating Defendant’s alleged failure  
24 to reinvestigate is **GRANTED**.

#### 25 **ANTICIPATED PROFITS**

26 Defendant seeks summary judgment on Plaintiff’s three damage claims relating to  
27 anticipated profits asserting they are barred as a matter of law (*Id.* at 28). The three damage  
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1 claims at issue are: 1) \$11,741,500 in lost profits on twenty-one (21) properties Plaintiff  
2 alleges he had to sell earlier than anticipated; 2) \$6,250,000 in lost profits on the  
3 undeveloped Cashill subdivision; and 3) \$25,000 in lost profits on Plaintiff's Sky T stock that  
4 Plaintiff alleges he had to sell earlier than anticipated.

5 The court has already determined that Plaintiff's damage claims for lost profits on the  
6 sale of the twenty-one (21) properties at issue and the undeveloped Cashill subdivision are  
7 not recoverable under the FCRA; therefore, the court need not determine whether said profits  
8 are too speculative or contingent to be recoverable. The court also determined that there are  
9 genuine issues of material fact as to whether Plaintiff's Sky T stock is recoverable under the  
10 FCRA. In the event such damages are cognizable, which will be determined at the time of  
11 trial, the court will then consider whether Plaintiff's stocks are too speculative or contingent  
12 to base an award of damages. Accordingly, summary judgment on Plaintiff's lost profits  
13 associated with the twenty-one (21) properties and the Cashill subdivision is **GRANTED**.  
14 Summary judgment on Plaintiff's damages associated with the Sky T stock is **DENIED**.

15 **LOST REAL ESTATE OPPORTUNITIES**

16 Defendant seeks summary judgment on Plaintiff's damage claim for \$9,420,450 for  
17 missing out on fifty (50) real estate transactions (Doc. #105 at 29). Defendant contends there  
18 is no authority that would entitle Plaintiff to damages based on Plaintiff's own personal  
19 decision not to apply for credit out of fear of his own credit report (*Id.* at 30).

20 The court already determined that Plaintiff failed to show a consumer report was  
21 involved in any of the fifty (50) real estate transactions at issue; thus, these transactions are  
22 not subject to the FCRA. Accordingly, the court need not address whether Plaintiff's personal  
23 decision not to apply for credit in these transactions entitles Plaintiff to recoverable damages  
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1 under the FCRA.<sup>10</sup> Accordingly, summary judgment on these fifty (50) real estate  
 2 transactions is **GRANTED**.

### 3 **PUNITIVE DAMAGES**

4 Defendant seeks summary judgment on Plaintiff's punitive damages claim contending  
 5 Plaintiff failed to plead sufficient facts to show Defendant's alleged failure to reinvestigate  
 6 was willful (Doc. #105 at 30). Defendant contends Plaintiff has pled no facts and presented  
 7 no evidence to support his claim that Defendant knowingly or recklessly failed to  
 8 reinvestigate the information it reported to the CRAs (*Id.*). Defendant argues that Plaintiff's  
 9 Complaint contains a number of reinvestigation actions undertaken by Defendant; therefore,  
 10 summary judgment on this claim is appropriate (*Id.*).

11 Plaintiff argues Defendant is making a motion to dismiss the complaint based on an  
 12 alleged deficiency in the pleadings and the time for such a motion has long passed (Doc. #112  
 13 at 7). Plaintiff further argues that he has offered direct testimony and documentation  
 14 regarding Defendant's willful non-compliance and has previously noticed the depositions of  
 15 Defendant's persons most knowledgeable and Ms. Drzewicki, but Defendant requested they  
 16 be taken off calendar until a mutually convenient date could be reached between the parties  
 17 (Doc. #112 at 7).

18 As previously discussed, an award of punitive damages under the FCRA is within the  
 19 discretion of the court, provided Plaintiff proves Defendant's violation was willful. The  
 20 Supreme Court, affirming the Ninth Circuit's interpretation of "willfulness", defined  
 21 "willfull" for purposes of the FCRA in *Safeco Ins. Co. of America v. Burr*, ---- U.S. ----, 127  
 22 S.Ct. 2201, 2208 (2007), in which the Court held that willful extends to acts known to violate  
 23 the FCRA, as well as a reckless disregard of a statutory duty. The Court defined recklessness  
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25 <sup>10</sup> The court notes that the Ninth Circuit has recognized a damage claim for lost opportunities, *i.e.*, being  
 26 deterred from applying for credit pending resolution of inaccurate reporting. *See Guimond*, 45 F.3d at 1332, n.2;  
 27 *see also, Cairns v. GMAC Mortg. Corp.*, ---- F. Supp. 2d ---- (D. Ariz. 2007), 2007 WL 735564 (D. Ariz. 2007)  
 28 (official citation not available) (agreeing that the Ninth Circuit previously recognized that damages may flow from  
 a consumer being deterred from exercising his or her right to apply for credit as a result of inaccurate reporting  
 until the erroneous information is deleted).

1 as “generally understood ... as conduct violating an objective standard: action entailing ‘an  
 2 unjustifiably high risk of harm that is either known or so obvious that it should be known.’”  
 3 *Id.* at 2215 (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). The Ninth Circuit has  
 4 determined that a company is liable for a willful violation of the FCRA if it “knowingly and  
 5 intentionally committed an act in conscious disregard for the rights of others.” *Reynolds v.*  
 6 *Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1085 (9th Cir. 2006), rev’d on other  
 7 grounds by *Safeco*, 127 S.Ct. 220. A conscious disregard is “either knowing that policy to be  
 8 in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless  
 9 disregard of whether the policy contravened those rights.” *Id.* (citing *Cushman*, 115 F.3d at  
 10 227).<sup>11</sup>

11 Here, Plaintiff asserts the following facts in support of his willful violation claim.<sup>12</sup> On  
 12 or about December 13, 2004, Plaintiff was alerted by his credit report service that a  
 13 derogatory item was being reported on his credit report by Defendant (Loan 56) (Doc. #66  
 14 at 6). Plaintiff then notified each of the big CRAs that he disputed the information reported  
 15 by Defendant (*Id.*).<sup>13</sup> Defendant had 30-days from being notified of the dispute by the CRAs  
 16 to reinvestigate the disputed information. During that 30-day period, Defendant sent letters  
 17 to Plaintiff notifying him that Loan 56 was in default (*Id.*). Then, on or about January 3,  
 18 2005, Plaintiff personally notified Defendant that he was being damaged as a result of  
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20 <sup>11</sup> The Ninth Circuit adopted the Third Circuit’s definition of “willfully”, as employed under the FCRA.  
 21 *Reynolds*, 435 F.3d at 1098 (quoting *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997)), rev’d on  
 22 other grounds by *Safeco*, 127 S.Ct. 220. However, at least one district court, in *Edwards v. Toys “R” Us*, 527 F.  
 23 Supp. 2d 1197 (C.D. Cal. 2007), found the Ninth Circuit’s definition of recklessness may be slightly more expansive  
 24 than the Supreme Court’s definition in *Safeco*. *Id.* at 1209 (“The circuit court’s definition of the standard for  
 recklessness appears to be slightly more expansive than that set forth in *Safeco*, however. The Ninth Circuit holds  
 that “‘willfully’ entails a ‘conscious disregard’ of the law, which means ‘either knowing that policy [or action] to  
 be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether  
 the policy [or action] contravened those rights.’”).

25 <sup>12</sup> The Court notes that Defendant’s liability did not attach until after the 30-day reinvestigation period  
 26 expired; therefore, the court only considered actions taken by Defendant after that period in determining if  
 Plaintiff has provided sufficient evidence to support his willful violation claim.

27 <sup>13</sup> The record indicates Plaintiff filed a Credit Report Dispute Form on December 14, 2004 (Doc. #105 at  
 28 26).



1 Defendant's failure to correct its inaccurate reporting of Loan 56 (Doc. #66 at 6). On or  
2 about January 5, 2005, Plaintiff received a letter from Defendant acknowledging that  
3 Defendant had misapplied check number 1080 to Loan 55, rather than Loan 56; but that it  
4 would not correct its error because Loan 55 was delinquent (*Id.*). Plaintiff then telephoned  
5 Defendant and informed Defendant that it was mistaken about Loan 55 being delinquent and  
6 Defendant confirmed this information, assuring Plaintiff that check 1080 would be reversed  
7 and applied to Loan 56 (*Id.* at 6-7). Next, on or about February 3, 2005, Plaintiff received a  
8 letter from Ms. Kathy Drzewiecki of the Executive Communications Division assuring  
9 Plaintiff she would review the disputed information and, on that same date, Plaintiff received  
10 a letter from Well's Fargo's Default Administration stating that it was contacting the various  
11 CRAs and instructing them to correct the previously reported inaccurate information  
12 regarding Loan 56 (*Id.* at 7). On or about February 11, 2005, Plaintiff received a letter from  
13 Ms. Drzewiecki confirming that check 1080 had not been applied to Loan 56 and was, in fact,  
14 applied to Loan 55; however, Ms. Drzewiecki stated Defendant would not correct its error  
15 because Loan 55, to which it had been applied, was delinquent (*Id.*). Plaintiff contends Loan  
16 55 was not delinquent (*Id.*). On or about March 21, 2005, Defendant again notified Plaintiff  
17 that Loan 56 was in default and seriously delinquent and, on or about March 30, 2005,  
18 Plaintiff sent another letter to Defendant regarding its error (*Id.*). Plaintiff also sent the  
19 following letters to Defendant: 1) April 1, 2005, letter confirming his telephone conversation  
20 with Ms. Drzewiecki outlining events leading up to this date; 2) April 4, 2005, notice of  
21 adverse action taken against him by other banks and lenders; and 3) April 4, 2005, letter  
22 regarding Bank of America's decision to reduce his credit line (*Id.* at 8). Defendant then sent  
23 Plaintiff a letter, on or about April 7, 2005, including two (2) copies of check 1080, one which  
24 was Plaintiff's copy he originally sent to Defendant in October of 2004 and the other which  
25 was a copy of the electronically cashed check that had been applied to Loan 55 (*Id.*).  
26 Plaintiff's copy of check 1080 contained the old and new loan numbers for Loan 56 and the  
27 street address associated with Loan 56 (Plaintiff claims on his copy the last digit of the new  
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1 loan number had the numeral 6 imposed on top of the number 5) (Doc. #66 at 8).  
2 Defendant's copy of check 1080 contained the old and new loan numbers for Loan 56 and the  
3 street address associated with Loan 56; but, the new loan number for Loan 56 had been  
4 scratched out and the new loan number for Loan 55 was written on the check (*Id.*). On or  
5 about April 17, 2005, Plaintiff sent an urgent letter via facsimile and FedEx regarding its  
6 continued failure to correct its error and the inaccurate reporting to the CRAs (*Id.* at 8-9).  
7 Plaintiff obtained counsel on or about April 27, 2005 and Defendant commenced foreclosure  
8 proceedings on Loan 56 on or about May 4, 2005 (*Id.* at 9).

9 Construing the pleadings and evidence in the light most favorable to Plaintiff, it  
10 appears Defendant acknowledged it had misapplied Plaintiff's loan payment to another  
11 account (albeit another of Plaintiff's accounts) and then willfully refused to correct its own  
12 error. Apparently, that error is what caused Loan 56 to go into default. Thus, assuming  
13 Defendant had applied the payment to the correct account (Loan 55), Loan 56 would not have  
14 gone into default and Defendant would not have reported the default to the CRAs. Then,  
15 after being notified by the CRAs that Plaintiff disputed the information it was reporting  
16 regarding Loan 56, and after acknowledging its own error in misapplying Plaintiff's check,  
17 Defendant, nevertheless, willfully and intentionally refused to reverse the check and credit  
18 it to the proper account (Loan 56). Instead, Defendant informed Plaintiff it would not reverse  
19 its own error because Loan 55 was delinquent.

20 Acknowledging its own error and refusing to correct it, while still reporting negative  
21 information to the CRAs, certainly qualifies as willfulness under the FCRA. Defendant was  
22 notified by the CRAs that the information was in dispute and Plaintiff notified Defendant on  
23 numerous occasions that it had misapplied a payment, which was causing serious damage to  
24 Plaintiff. Construing the evidence most favorable to Plaintiff, Defendant had an obligation  
25 to reinvestigate the disputed information, which it apparently did; but then it openly refused  
26 to correct its own error. Then, on or about February 3, 2005, after the expiration of the 30-  
27 day reinvestigation period expired, Defendant's Default Administration Division informed  
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1 Plaintiff that it was contacting the various CRAs and instructing them to correct the  
2 previously reported inaccurate information regarding Loan 56, yet, apparently this was never  
3 done. Under these facts, Plaintiff has sufficiently pled a willful violation of the FCRA;  
4 therefore, summary judgment on Plaintiff's punitive damages claim is **DENIED**.

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**IV. CONCLUSION**

For the reasons set forth above, Defendant's Motion for Summary Judgment (Doc. #105) is **GRANTED in part and DENIED in part** as follows:

1. Dove Street Capital Lenders (the "Dove Street Loan") - **GRANTED**
2. Loans from family and friends to pay the Dove Street Loan monthly payments - **GRANTED**
3. Southern Oregon Investment Group (SOIG) - **GRANTED**
4. Late fees and costs on rental properties - **GRANTED**
5. James Lane Property - **DENIED**
6. Anticipated profits on Cashill subdivision - **GRANTED**
7. Detrick Loan - **GRANTED**
8. Erna Way - **DENIED**
9. Sale of 21 properties - **GRANTED**
10. Lost business opportunities on fifty (50) transactions - **GRANTED**
11. Sky T Stock - **DENIED**
12. Interest on son's student loans - **GRANTED**
13. Credit cards - **DENIED**
14. Credit lines - **DENIED**
15. Damages predating Defendant's failure to reinvestigate - **GRANTED**
16. Punitive damages - **DENIED**

DATED: May 14, 2008.



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UNITED STATES MAGISTRATE JUDGE